Chapter IV

2005 REFORM LEGISLATION ADDRESSING THE MONITOR'S RECOMMENDATIONS

A. Senate Bill 231 (Figueroa)

Many of the key recommendations contained in the Enforcement Monitor's *Initial Report* were incorporated into Senate Bill 231 authored by Senator Liz Figueroa, who chairs both the Senate Committee on Business, Professions and Economic Development and the Joint Committee on Boards, Commissions and Consumer Protection (formerly called the "Joint Legislative Sunset Review Committee"). During the summer of 2005, SB 231 passed both houses of the Legislature; the bill was signed into law by Governor Schwarzenegger on October 7, 2005 (Chapter 674, Statutes of 2005). SB 231 will become effective on January 1, 2006.

SB 231 was introduced on February 15, 2005, and was substantively amended five times before it was finally enrolled to the Governor as a 30-part bill on September 12, 2005. As enacted, SB 231 contains a mix of provisions. Many of them directly implement the Monitor's recommendations. Some of them only partially implement a Monitor recommendation; the compromise reflects the give-and-take of the political process as the bill moved through various committees and both houses of the Legislature, and was ultimately negotiated with the Schwarzenegger administration late in the process. Other provisions in SB 231 did not originate with the Monitor at all, but reflect the desires of the Medical Board, the California Medical Association, or the Schwarzenegger administration.

The provisions of SB 231 may be grouped into the same seven categories of Monitor recommendations described in Chapter III (with two additional categories relating to sunset provisions and technical amendments):

1. Structural reform of the enforcement program. In the *Initial Report*, the Monitor identified several structural issues that cause delay, inefficiency, or unnecessary cost to the Medical Board, its licensees, and the public. Some of these structural issues have been addressed in SB 231:

■ ***Investigations/prosecutions***. In Chapters VII and IX of the *Initial Report*,[35] the Monitor criticized the inefficiency inherent in the fragmented relationship between the Medical Board's investigators and the Attorney General's prosecutors. Currently, a professional investigator employed by the Medical Board must work up a disciplinary matter with little or no legal guidance, no input on the design of the investigation from the prosecutor who will file and try that case, and no ability to assist that prosecutor at the resulting administrative hearing. The investigator then "hands off" that investigative file to a professional prosecutor who works for a different agency (the Health Quality Enforcement Section of the Attorney General's Office), has had no input into the design of the investigation or the selection of the expert (much less the documents given to that expert), and thereafter lacks vitally important investigative assistance. In Recommendations #22 and #33, the Monitor called for full implementation of the "vertical prosecution" model widely used at similar law enforcement agencies at the state, local, and federal levels, in which an investigator/prosecutor team is assigned to work a case together from its inception through its ultimate closure. The Monitor stated that the optimum way to implement vertical prosecution is to merge investigators and prosecutors into the same agency, but noted that the model can be applied — although somewhat less easily — to personnel working for different agencies so long as both agencies are committed to the key components of vertical prosecution.[36]

As amended on August 30, SB 231 would have transferred the Medical Board's investigators into HQE to enable full implementation of the vertical prosecution model, and transferred the responsibility to "investigate" cases from MBC to HQE. That version of the bill was supported by MBC, HQE, the California Medical Association (CMA), Kaiser Permanente, two prominent defense attorneys whose practices concentrate on physician defense, eight former Medical Board presidents, one former Medical Board executive director, Governor Pete Wilson's Department of Consumer Affairs Director, and the Federation of State Medical Boards. Despite this strong showing of support, the Schwarzenegger Administration opposed the transfer of MBC's investigators to HQE. Thus, the final language of SB 231 implements vertical prosecution without the immediate transfer of investigative staff. However, the bill envisions legislative reconsideration of the transfer during 2007, and contains funding for full implementation of vertical prosecution including the transfer.

Specifically, SB 231 adds new section 12529.6 to the Government Code, which — in subdivision (a) — makes a legislative finding that because of the critical importance of MBC's

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[35] *Initial Report*, *supra* note 13, at 129–40, 170–71.

[36] *Id*. at 136. The Monitor identified these components as "(1) early coordination of the efforts of attorneys, investigators, and other staff; (2) continuity of teamwork throughout the life of a case; (3) mutual respect for the importance of the professional contributions of both attorneys and investigators, and the value of having both available in all stages of the case; and (4) early designation of trial counsel, recognizing that the prosecutor who ultimately puts on the case must be assigned from the case's inception to help shape and guide it because the purpose of any investigation is the *preparation of a case for trial*." *Id*. at 135–36 (emphasis original).

enforcement function, "using a vertical prosecution model . . . is in the best interests of the people of California." Section 12529.6(b) requires that, as of January 1, 2006, each complaint that is referred for investigation be "simultaneously and jointly" referred to an investigator/prosecutor team (including the prosecutor who will ultimately file and try the case) which will handle the matter for its duration. Under the direction of the prosecutor, the investigator will gather evidence that enables the prosecutor to advise MBC whether and how to proceed with formal disciplinary proceedings.

SB 231 also adds new Government Code section 12529.7 which requires the Medical Board — in consultation with the Department of Justice, the Department of Consumer Affairs, the Department of Finance, and the Department of Personnel Administration — to report and make recommendations to the Legislature by July 1, 2007 on the vertical prosecution model created in Government Code section 12529.6.

In the meantime, SB 231 prepares MBC and HQE for the eventual transfer of MBC's investigators to HQE and full implementation of vertical prosecution. SB 231 amends Government Code section 12529(a) to transfer the investigative function to HQE; adds new section 2006 to the Business and Professions Code to redefine "MBC investigations" as "HQE investigations"; amends Government Code section 12529.5(b) to eliminate the "deputy in district office" (DIDO) program under which HQE has been required to place prosecutors onsite at MBC district offices to provide legal guidance to investigators[37] — this program will be unnecessary when MBC investigators are transferred to HQE; and adds new section 2435.3 to the Business and Professions Code to authorize MBC to increase its licensing fees to cover the additional costs of transferring its investigators to HQE.

As noted above, MBC must report to the Legislature on the progress of the vertical prosecution model mandated in SB 231 by July 1, 2007, and all of the newly added provisions relating to vertical prosecution sunset on July 1, 2008 — meaning that during 2007, the Legislature will have another opportunity to evaluate the feasibility of the transfer of MBC's investigators to HQE and enact legislation mandating it.

■ ***Venue for administrative hearings***. In Chapter IX of the *Initial Report*,[38] the Monitor found that Government Code section 11508 — the statute that governs the venue (location) of adjudicative hearings and that allows hearings to be held anywhere in the state — results in substantial and unnecessary costs for MBC, HQE, the Office of Administrative Hearings (OAH, which supplies the administrative law judges (ALJs) who preside over MBC disciplinary hearings), and the physician population as a whole. In Recommendation #39, the Monitor suggested that section 11508 be amended to require most hearings to be held in large cities in which both HQE and OAH have existing offices and hearing facilities.

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[37] *See id*. at 131–34 for a description of the DIDO program.

[38] *Id*. at 175–76.

SB 231 amends Government Code section 11508 to require Medical Board administrative hearings to be held at the OAH facility that is closest to the location where the transaction occurred or the respondent physician resides. The amendments to section 11508 preserve the ability of the parties to agree to a different venue; they also preserve the ability of the respondent to move for a change of venue and the discretion of the ALJ to order a change of venue. However, unless good cause is identified in writing by the ALJ, the hearing shall be held in a facility maintained by OAH. Thus, SB 231 imposes a presumption that most MBC adjudicative hearings will be held at secure OAH facilities.

■ ***Venue for writs of mandate***. After MBC issues a formal disciplinary decision against a physician, that physician is entitled to challenge MBC's decision by filing a petition for writ of mandate in a superior court. In Chapter XII of the *Initial Report*,[39] the Monitor found that Business and Professions Code section 2019 — the statute that currently governs the venue (location) for the filing of a petition for writ of mandate and allows a disciplined physician to file a petition in superior court in Sacramento, San Francisco, Los Angeles, or San Diego (regardless of where the administrative hearing was held and where the prosecutor who must defend the writ is located) — appears to be encouraging "forum-shopping" and inefficient use of judicial resources, and is unnecessarily costing HQE and MBC substantial amounts of money every year. In Recommendation #46, the Monitor called for the amendment of section 2019 to require a disciplined physician to file a petition for writ of mandate in the superior court in the large city (either Sacramento, San Francisco, Los Angeles, or San Diego) closest to where the administrative hearing was held.

Until August 30, SB 231 contained an amendment to section 2019 that would have implemented Recommendation #46. However, the amendment was opposed by CMA and various defense attorneys who represent physicians before MBC; they raised questions regarding the Monitor's "forum-shopping" conclusion. Because this matter warrants further discussion, the amendment was eventually dropped from the bill.

2. Adequate resources for MBC enforcement. In Chapter V of the *Initial Report*,[40] the Monitor noted that MBC is a "special fund" agency that is funded solely by physician licensing fees, and that — despite the 1975 promise of the medical profession to support a vigorous enforcement program[41] — those fees have not been increased since January 1994. Due to this funding freeze (which worked a 28% cut in MBC spending power between 1994 and 2004), MBC was forced to cut proactive enforcement programs, reduce the hours worked by its physician employee "medical

[39] *Id*. at 201–02.

[40] *Id*. at 64–67.

[41] *Id*. at. 19–22, 65.

consultants" who assist MBC investigators in deciphering medical records and issues, and eliminate training programs for its investigative staff. Additionally, and as noted above,[42] MBC lost 29 enforcement positions (and HQE lost six prosecutor positions) due to the imposition of the state's 2001–04 hiring freeze. In Recommendations #1 and #2, the Monitor stated that MBC's initial and biennial renewal licensing fees should be increased to $800 ($400 per year) to enable the Board and HQE to reinstate lost enforcement positions, fully implement vertical prosecution, resume training programs, provide sufficient funding for medical consultants, and cover the increased costs of doing business.

SB 231 enhances the funding available to MBC so that it can rebuild and strengthen its enforcement program:

■ ***Increased license fees***. SB 231 amends subsections (c) and (d) of Business and Professions Code section 2435 to increase, respectively, MBC's initial and biennial renewal licensing fees to a base fee of $790 ($395 per year). Further, the bill codifies these fees in statute. In the past, the Legislature established a "fee ceiling" and permitted the Board to adjust fees beneath that ceiling through the rulemaking process (which is subject to review by the Department of Consumer Affairs and the Office of Administrative Law). SB 231 establishes the base fee of $790 in statute, and amends section 2435(h) to state the Legislature's intent that MBC fees should always be set to ensure that the Board can cover its annual budget and also maintain two months' worth of operating expenses in its reserve fund.

■ ***Compensation for the elimination of cost recovery***. Under Business and Professions Code section 125.3, the Medical Board — like all other DCA agencies — was authorized to request reimbursement of some of its investigative and enforcement costs against disciplined licensees. For over a decade, MBC's implementation of this so-called "cost recovery" statute was the object of intense criticism by CMA and other physician groups, who frequently offered to agree to a fee increase in exchange for a cap on or elimination of MBC's cost recovery ability.[43] At the request of CMA, SB 231 adds new subsection (k) to section 125.3 to eliminate MBC's ability to request and receive cost recovery from its licensees. Section 125.3(k) specifies that the change must be "revenue-neutral" to MBC, meaning that license fees must be increased above the $790 base fee to make up for the loss to MBC of approximately $850,000 per year in cost recovery. SB 231 thus amends Business and Professions Code section 2435(e) to allow the Board — via the rulemaking process — to increase its base initial and renewal fees above $790 to compensate for (a) the loss of cost recovery revenue, and (b) any "uptick" in investigative and other enforcement costs that accompanies the elimination of cost recovery.

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[42] *See supra* Ch. III.A.2.

[43] *Initial Report*, *supra* note 13, at 39, 43–46.

■ ***Covering the costs of the transfer of MBC investigators to HQE***. As noted above, SB 231 requires MBC and HQE to immediately implement a form of vertical prosecution without physically transferring MBC's investigators to HQE. That transfer will be evaluated by the Legislature in 2007. If the investigators are transferred, their salaries will likely increase to conform with the salaries of other investigative staff within the Attorney General's Office. SB 231 anticipates that eventuality by adding new section 2435.3 to the Business and Professions Code, which allows MBC to increase initial and renewal licensing fees by an additional $20 above the base fee of $790 if its investigators are transferred to HQE after 2008.

■ ***Eliminating the MBC cross-subsidy of hearing transcript costs***. Under Code of Civil Procedure section 1094.5, a disciplined physician who wishes to challenge MBC's decision by filing a petition for writ of mandate must first request the preparation of the hearing transcript by OAH. If the physician petitioner prevails, section 1094.5 requires MBC to reimburse him for the cost of the transcript. Although section 1094.5 expressly states that "the cost of preparing the transcript shall be borne by petitioner," two sections of the Government Code cap the amount that must be paid by the petitioner and require the agency (here, MBC) to pay the rest. In Chapter XII of the *Initial Report*,[44] the Monitor found that Government Code section 11523 forces the Medical Board to improperly cross-subsidize the cost of preparing hearing transcripts to the tune of thousands of dollars per transcript. In Recommendation #47, the Monitor urged the amendment of section 11523 to require the petitioner to pay the entire cost of the transcript up front.

SB 231 amends Government Code section 11523 to require a petitioner to pay the full cost of hearing transcript preparation to OAH. The amendment preserves the petitioner's right to full reimbursement of this cost if the petitioner prevails in the writ proceeding, and does not affect the right of *in forma pauperis* (indigent) petitioners to a free copy of the transcript under Civil Procedure Code section 1094.5 and Government Code section 68511.3.

3. Reduction of investigative delays. In Chapters VI and VII of the *Initial Report*,[45] the Monitor found that MBC takes an average of 340 days to screen and investigate a serious case of physician misconduct — almost double the 180-day goal established in statute since 1991.[46] The Monitor identified the medical records procurement step as one of the lengthiest components of the screening and investigative process. Whereas Business and Professions Code section 2225 requires physicians to turn over lawfully requested medical records of a patient (where the patient has signed a release) to the Medical Board within 15 days (except for "good cause"), the Monitor found that it

[44] *Id*. at 202–03.

[45] *Id*. at 100–01, 125–29, 140–41.

[46] Business and Professions Code section 2319 establishes as the goal for the MBC discipline system that "an average of no more than six months will elapse from the receipt of the complaint to the completion of the investigation."

takes MBC's Central Complaint Unit and district office investigators an average of 140 days to collect medical records that are essential to proving a quality of care case — or 77% of the 180-day goal established in state law for the investigative process.[47] In the Monitor's estimation, both MBC personnel and HQE prosecutors have demonstrated inappropriate tolerance for these lengthy delays. In Recommendations #7, #23, and #34, the Monitor called on MBC and HQE to revise their medical records procurement policies with an eye toward zero tolerance of unnecessary delays, and suggested a number of statutory mechanisms to stimulate physician compliance with requests for medical records.

SB 231 amends section 2225(d) to define the term "good cause" and to extend the time within which physicians must produce requested medical records to 15 business days from the date of MBC's request. Further, SB 231 authorizes MBC to utilize its existing citation and fine authority[48] to immediately penalize physicians who fail to produce requested medical records within 15 business days and without good cause. SB 231 specifies that the citation and fine remedy is in addition to other remedies available to MBC (including subpoenas and subpoena enforcement proceedings, certain warrantless searches, and the use of administrative inspection warrants under Code of Civil Procedure section 1822.50 in appropriate cases).

SB 231 also streamlines another component of the complaint screening process required by Business and Profession Code section 2220.08. That section requires quality of care complaints to undergo "specialty review" in the Central Complaint Unit before their transfer to the field for formal investigation. In Recommendation #10, the Monitor urged that new complaints against physicians who are already under investigation, the subject of a filed accusation, or who are on probation should be exempt from the specialty review requirement and forwarded immediately to the field. SB 231 amends section 2220.08 to that effect.

4. Timely exchange of expert opinions. In Chapter VIII of the *Initial Report*,[49] the Monitor noted that MBC requires its expert witnesses to reduce their expert opinions to writing — such that they are immediately discoverable by the defense once an accusation is filed. However, many defense counsel instruct their expert witnesses not to reduce their opinions to writing, so that the HQE prosecutor often has no idea of the substance of defense counsel's expert opinion until that expert takes the stand at the administrative hearing. The Monitor noted that this practice results in the unfair "sandbagging" of the prosecutor and greatly reduces the prospects for settlement prior to the costly hearing. In Recommendation #30, the Monitor suggested that the Medical Practice Act

[47] *Initial Report*, *supra* note 13, at 140.

[48] *See* Bus. & Prof. Code § 125.9.

[49] *Initial Report*, *supra* note 13, at 160–61.

be amended to provide that any party wishing to rely on expert testimony must reduce that expert testimony to writing and provide it to the other party well in advance of the hearing.

SB 231 adds new section 2334 to the Business and Professions Code, which requires a party to a Medical Board disciplinary proceeding who wishes to rely on expert testimony to exchange certain information in writing with counsel for the other party: (1) a curriculum vitae of the expert; (2) a brief narrative statement of the general substance of the testimony that the expert is expected to give, including any opinion testimony and its basis; (3) a representation that the expert has agreed to testify at the hearing; and (4) a statement of the expert's hourly and daily fee for providing testimony and consultation. The exchange of this information — which will benefit both sides — must occur at least 30 days prior to the commencement of the administrative hearing or as ordered by the OAH ALJ. OAH is authorized to adopt regulations to implement this section.

5. Improved detection of physician misconduct. In Chapter VI of the *Initial Report*,[50] the Monitor noted that Business and Professions Code section 800 *et seq*. sets forth an extensive "mandatory reporting scheme" intended to enable MBC to detect physician negligence, incompetence, dishonesty, and impairment so that it might investigate and take action as appropriate. A variety of actors — including medical malpractice insurance companies, court clerks, hospitals and health plans, employers of physicians, physicians themselves, and even counsel for physicians — are required to report certain events to the Medical Board. However, the Monitor found that many of MBC's most important detection mechanisms are failing. In response to several Monitor recommendations, SB 231 strengthens a few of these reporting requirements:

■ ***Self-reporting of civil malpractice judgments***. Business and Professions Code section 802(b) currently requires uninsured physicians to self-report to MBC arbitration awards in any amount and civil malpractice settlements over $30,000. SB 231 amends section 802(b) to require physicians to additionally self-report to MBC civil judgments in any amount.

■ ***Self-reporting of misdemeanor criminal convictions***. Section 802.1(a)(2) currently requires physicians to self-report to MBC felony criminal convictions. SB 231 amends that section to require physicians to self-report misdemeanor criminal convictions that are substantially related to the qualifications, functions, and duties of a physician. This self-reporting requirement will be triggered after MBC compiles, and the Legislature enacts, a list of such substantially related criminal convictions.

■ ***Health facility "peer review" reporting***. Business and Professions Code section 805 requires hospitals, health care facilities, and HMOs to file a report with MBC when they take certain

[50] *Id*. at 109–14.

internal disciplinary actions against the admitting privileges of a physician. As documented in the *Initial Report*, section 805 reporting is one of the most valuable sources of complaints resulting in the investigation, prosecution, and disciplinary action in high-priority cases against physicians.[51] However, the number of section 805 reports filed each year has steeply declined — and 2004–05 is no exception.[52] In 2001, the Legislature added section 805.2 to the Business and Professions Code, requiring MBC to contract with an external entity to engage in a comprehensive study of the way in which peer review is actually conducted in California today, and to compare that with the reporting language in section 805. Specifically, the statute instructs the independent contractor to assess the need to amend sections 805 *et seq*. "to ensure that they continue to be relevant to the actual conduct of peer review," and to determine "whether the current reporting requirement is yielding timely and accurate information to aid licensing boards in their responsibility to regulate and discipline healing arts practitioners when necessary, and to assure that peer review bodies function in the best interests of patient care." Due to MBC's budget constraints, that study has never been conducted, section 805's reporting requirements have never been amended, and section 805 reporting continues to decline — to the detriment of the patients it is supposed to benefit.

SB 231 amends section 805.2 to require MBC to contract with an external entity to conduct the study mandated in 2001 by July 31, 2007. Under SB 231, "[c]ompletion of the peer review study . . . shall be among the highest priorities of the Medical Board of California."

6. Enhanced public disclosure. In Chapter XIII of the *Initial Report*, the Monitor noted the importance of MBC's public disclosure policy — especially in light of the legal, structural, staffing, and resource limitations on MBC's enforcement program: "It is thus reasonable to expect MBC, as a complement to its enforcement program, to provide consumers with true, accurate, and complete information about its licensees so they can make informed choices and protect themselves from physicians with whom they would prefer not to deal."[53] However, the Monitor found that the complex tangle of existing statutes and regulations that forms MBC's "public disclosure policy" does not permit the Board to disclose all information about physician histories that consumers might deem relevant and important — including public information that is known to the Medical Board. In Recommendations #48–#52, the Monitor suggested that the existing statutes be consolidated and harmonized to eliminate drafting errors, inconsistencies, and confusion, and that certain additional events — including civil malpractice settlements over $30,000 and misdemeanor criminal convictions against physicians — be publicly disclosed on MBC's Web site.

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[51] *Id*. at 86–87 and 90–93.

[52] *See infra* Ch. VI.B.5. for the number of section 805 reports filed with MBC in fiscal year 2004–05.

[53] *Initial Report*, *supra* note 13, at 205.

SB 231 makes several immediate changes to MBC's public disclosure policy and directs that an in-depth study of the role of public disclosure within MBC's public protection mandate be undertaken by a respected oversight agency:

■ ***Board posting of past disciplinary actions***. Business and Professions Code section 2027(a)(2) previously contained language that appeared to preclude MBC from posting its own prior disciplinary actions against physicians on its Web site. That language was found to be a legislative drafting error in a recent decision in *Szold v Medical Board of California*,[54] and SB 231 amends section 2027(a)(2) to correct the error.

■ ***Board posting of substantially related misdemeanor criminal convictions***. Although MBC is authorized to post felony criminal convictions on its Web site for an indefinite period of time,[55] it is not authorized to post any misdemeanor criminal convictions — no matter their seriousness, their relationship to the practice of medicine, or their number, and despite the fact that all criminal convictions are public information. SB 231 adds new subdivision (a)(7) to section 2027, which requires MBC to post on its Web site misdemeanor criminal convictions that are "substantially related to the qualifications, functions, or duties of a physician and surgeon." Under amended section 2027(b)(1), such criminal convictions will be posted for ten years. Under new section 2027(d), this new disclosure requirement is not effective until MBC presents to the Legislature, and the Legislature enacts, a list of misdemeanor convictions that are "substantially related."

■ ***Little Hoover Commission study of public disclosure***. Rather than adding more public disclosure requirements in piecemeal fashion, SB 231 adds new section 2026 to the Business and Professions Code, which requires — to the extent MBC funding is available — the Milton Marks Commission on California State Government Organization and Economy (also known as the "Little Hoover Commission"), an independent watchdog agency, to "study and make recommendations on the role of public disclosure in the public protection mandate of the board. This study shall include, but not be limited to, whether the public is adequately informed about physician misconduct by the current laws and regulations providing for disclosure." Section 2026 requires the study to be completed by July 1, 2008.

7. Reform of the Diversion Program. MBC's Diversion Program "diverts" substance-abusing physicians into a program that is intended to monitor them while they attempt to recover from the disease of addiction. Because Program participants often retain an unrestricted licensed to practice medicine, substance-abusing physicians pose a risk of grave harm to patients, and

[54] 127 Cal. App. 4th 591 (2005).

[55] Bus. & Prof. Code § 2027(a)(3); *see also id.* § 2027(b)(2).

participation in the Diversion Program is often concealed from patients and from MBC's enforcement program, the proper functioning of the Diversion Program is indispensable to protecting patients from potentially dangerous physicians. In Chapter XV of the *Initial Report*,[56] the Monitor undertook the first external audit of the Medical Board's Diversion Program in 18 years, and found significant deficiencies in its operations — many of which had been identified in the 1980s by the Auditor General. Twenty years later, the Monitor found that (1) the Program's monitoring mechanisms are inadequate; (2) the Program's internal quality controls are insufficient; (3) the Program is chronically understaffed; (4) the Program suffers from an absence of enforceable rules or standards to which participants and personnel are consistently held; (5) the Medical Board has failed to adequately supervise the Program; and (6) the Diversion Program improperly operates in a vacuum that prevents MBC management from detecting breakdowns in its functioning.

Monitor's Recommendations #56–#65 present a series of challenges to the Medical Board ranging from the conceptual to the operational. MBC is asked to reevaluate the whole concept of "diversion" — whether it is feasible, whether it is consistent with the Board's overall public protection mandate, and whether it should be operated by the Medical Board or contracted to a private entity. If MBC desires to keep the Program, the Monitor recommended that DMQ spearhead a comprehensive overhaul of the Program to correct longstanding and fundamental deficiencies identified by the Auditor General in the 1980s and again by the Monitor in 2004.

SB 231 gives the Medical Board more than two years to fully and finally address the problems that plague this critically important program. The bill adds new section 2358 to the Business and Professions Code. Section 2358 sunsets the provisions creating the Diversion Program as of July 1, 2008 — thus abolishing the Program within the Medical Board on that date. Prior to that date, however, the Board and its Diversion Committee may make internal and administrative changes, adopt regulatory changes, and propose statutory changes to strengthen the functioning of the Program. Additionally, under legislative intent language contained in Section 1 of SB 231, the Joint Legislative Audit Committee will be asked during 2006 to direct the Bureau of State Audits (formerly the Auditor General) to conduct a thorough performance audit of the Diversion Program by June 30, 2007. These audit results, along with the Board's internal changes and legislative suggestions, will be available to the Legislature when it decides (during 2007) whether to extend the existence of the Diversion Program beyond July 1, 2008.

Additionally, SB 231 adds new subdivision (b) to Business and Professions Code section 2343, which requires the Diversion Program Manager to account for all expenses and revenues of the Diversion Program and separately report this information to the Board on a quarterly basis. This provision relates to Monitor's Recommendations #60–#61, which call on MBC to earmark and

[56] *Initial Report*, *supra* note 13, at 254–85.

separate the Diversion Program's budget from the rest of MBC's budget and limit participation in the Program to that which Program staff can reasonably and effectively monitor.

8. Medical Board "sunset" provisions. Under California's "sunset review" process, the necessity and performance of state occupational licensing boards are reviewed every four years by the Joint Committee on Boards, Commissions and Consumer Protection; these reviews are triggered by the insertion of a "sunset date" (the date on which the board will cease to exist) into the statutory provision creating the board. The Medical Board's "sunset date" is July 1, 2006, as established in Business and Professions Code section 2001. SB 231 amends section 2001 to extend the existence of the 21-member Medical Board to July 1, 2010. SB 231 also amends section 2020 to authorize the Medical Board to employ an executive director until July 1, 2010. Finally, SB 231 adds new section 473.16 to the Business and Professions Code, which requires the Joint Committee to examine the composition of the Medical Board and its initial and renewal licensing fees and report to the Governor and Legislature by July 1, 2008.

9. Miscellaneous technical clean-up provisions. SB 231 also makes several technical clean-up changes recommended by the Monitor:

■ ***"Notices of intent."*** Code of Civil Procedure (CCP) section 364 requires any person who intends to sue a physician for medical malpractice to provide the physician with a "notice of intent to sue" at least 90 days prior to filing the lawsuit. CCP section 364.1 requires those persons to furnish MBC with a copy of the 90-day notice of intent (NOI) as well, ostensibly to alert MBC that a civil malpractice action may soon be filed against one of its licensees. In Chapter VI of the *Initial Report*,[57] the Monitor found that the information contained in NOIs is essentially useless to the Board, and that their inclusion as "complaints" in MBC enforcement data artificially skewed MBC's complaint totals upward and its complaint processing timeframes downward. The Monitor recommended that MBC discontinue counting NOIs as complaints, and further recommended the repeal of CCP section 364.1 in Recommendation #6. SB 231 repeals CCP section 364.1.

■ ***"Medical Discipline Report."*** Government Code section 11371(c), enacted in 1993, required the Office of Administrative Hearings to publish ALJ proposed decisions to the Medical Board, "together with court decisions reviewing those decisions, and any court decisions relevant to medical quality adjudications," in a quarterly *Medical Discipline Report*. The intent of the journal was to inform all parties — including licensees, HQE, respondent's counsel, and DMQ — of prior DMQ disciplinary decisionmaking in order to promote consistency and encourage settlements.[58] However, OAH never published the journal, and its intended "precedential" impact was superseded

[57] *Id*. at 97–98.

[58] *Id*. at 36, 193.

by the enactment of Government Code section 11425.60 in 1995. Therefore, the Monitor recommended that section 11371(c) be repealed (Recommendation #43). SB 231 repeals that section.

10. Future studies and reports. While the Enforcement Monitor project ends on November 1, 2005, SB 231 requires a number of additional studies, hearings, and reports on various issues related to MBC's enforcement program. The following table sets forth these post-Monitor activities:

DUE DATE	TOPIC
Early 2006	MBC must contract for the study of the peer review process. [Bus. & Prof. Code § 805.2]
Early 2006	The Joint Legislative Audit Committee (JLAC) is asked to assign the Bureau of State Audits (BSA) to perform a thorough performance review of MBC's Diversion Program. [SB 231 § 1 intent language]
Jan. 1, 2007	JLAC must appoint an external entity to review the Board's financial status, financial projections, and overall bookkeeping. [Bus. & Prof. Code § 2435(i)]
June 30, 2007	If authorized by JLAC during 2006, BSA must complete its audit of the Diversion Program. [SB 231 § 1 intent language]
July 1, 2007	MBC — in consultation with HQE, DCA, and the Department of Finance — must report to the Legislature on the progress of SB 231's version of vertical prosecution. [Gov't Code § 12529.7]
July 31, 2007	Peer review study must be completed. [Bus. & Prof. Code § 805.2]
2007	Legislature must pass legislation extending the Diversion Program and extending/refining vertical prosecution — or both will sunset as of July 1, 2008. [Bus. & Prof. Code § 2358; Gov't Code §§ 12529, 12529.5, 12529.6]
Jan. 1, 2008	The JLAC-selected auditor must complete its audit of MBC's finances/fees. [Bus. & Prof. Code §2435(i)]
July 1, 2008	The Joint Committee on Boards, Commissions and Consumer Protection must report to the Legislature on MBC's composition and its licensing fees. [Bus. & Prof. Code § 473.16]
July 1, 2008	The Little Hoover Commission must release its report on the role of public disclosure within MBC's public protection mandate. [Bus. & Prof. Code § 2026]
December 2008	The Joint Committee on Boards, Commissions and Consumer Protection must hold a sunset review hearing on MBC. [Bus. & Prof. Code § 2001]
2009	The Legislature must pass legislation continuing the existence of the Medical Board and its executive director — or both will sunset on July 1, 2010. [Bus. & Prof. Code §§ 2001, 2020

B. Assembly Bill 446 (Negrete McLeod)

In Chapter VI of the *Initial Report*,[59] the Monitor decried a common practice that affirmatively deprives MBC of information about physician misconduct, and of cooperation by patients who have been injured by physicians. When a patient sues a physician for medical malpractice, the physician may decide to settle with the patient. However, as a condition of settlement, the physician demands that the consumer agree not to contact the Medical Board, not to cooperate with the Medical Board (should the Board contact the patient upon receiving the section 801 report of the settlement), and/or to withdraw a complaint pending before the Board.

These so-called "regulatory gag clauses" cause many serious problems — both for the Medical Board that is being deprived of information about its own licensees by its own licensees and for unsuspecting patients who continue to be exposed to unscrupulous and/or incompetent physicians because MBC cannot take appropriate disciplinary action against them — the very antithesis of the purpose of all regulatory agencies and especially the Medical Board. During 2004, the Medical Board documented some of the costs of regulatory gag clauses.[60] The Board described a dozen recent cases from throughout the state in which regulatory gag clauses hindered or prevented investigations and/or prosecutions. These cases documented the considerable time CCU must spend attempting to persuade reluctant patients that the use of regulatory gag clauses by physicians has been invalidated by the courts[61] — which court decision seems not to have deterred physicians from inserting gag clauses into settlement agreements. If CCU cannot persuade the patient to sign a release for medical records (which records are otherwise privileged), it can request HQE to subpoena the records and then enforce the subpoena through a motion before the courts. This process takes considerable time — and some cases in which gag clauses were used had to be closed because the accusation could not be filed within the Board's statute of limitations.[62] This process also costs money — in one case arising out of San Jose, the existence of a gag clause in a civil settlement agreement cost MBC an additional 24 months in investigative time and $25,000 in attorneys' fees for the preparation and enforcement of a subpoena.

In Recommendation #17, the Monitor stated that regulatory gag clauses should be statutorily banned for all regulated trades and professions and particularly for physicians in light of the

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[59] *Id*. at 112–14.

[60] Medical Board of California, *Investigation of Impact of Regulatory Gag Clauses: Preliminary Findings* (January 13, 2004).

[61] *Mary R. v. Division of Medical Quality of the Board of Medical Quality Assurance* (1983) 149 Cal. App. 3d 308.

[62] Bus. & Prof. Code § 2230.5.

irreparable harm they can cause if they are incompetent, negligent, dishonest, or impaired. Recommendation #17 became the subject of AB 446 (Negrete McLeod), 2005 legislation that proposed to ban the inclusion of regulatory gag clauses in civil settlement agreements. During the summer of 2005, AB 446 passed both houses of the Legislature. Regrettably, the Governor vetoed AB 446 on September 29, finding that the bill would have a "negative effect" on the California economy. According to the Governor, "[w]hen parties who are in dispute agree to settle, there should be some assurances that the dispute has been resolved in a satisfactory and final manner for both parties."

This veto reflects a misunderstanding of the purpose of executive branch agencies, which is not to rubberstamp private dispute resolution but to protect future consumers from future injury caused by licensees of the State of California. The civil tort system and the administrative process have very different purposes. An outcome in one system should not necessarily dictate the outcome in the other. Concealment from a regulator should not be "on the table" during civil settlement negotiations. Regulated licensees should not be able to unilaterally deprive their own regulators of information about their own misconduct committed in the course and scope of the regulated business, and agencies should never be deprived of the discretion to investigate complaints or the cooperation of injured victims. Unfortunately, this veto undermines the purpose of occupational licensing agencies — which is to protect future unsuspecting consumers who were not a party to the settlement.

C. Senate Bill 1111 (Committee on Business, Professions and Economic Development)

Senate Bill 1111 (Committee on Business, Professions and Economic Development), which was passed by the Legislature and signed by the Governor (Chapter 621, Statutes of 2005), contains one technical clean-up change proposed by the Monitor. As suggested in Monitor's Recommendation #45, SB 1111 amends Business and Professions Code section 2230 to correctly reflect the number of members on DMQ's panels.